RAILROAD COMPANIES—CHANGE OF GRADE—LIABILITY TO ABUTTING OWNERS.—Prior to 1892, defendant railroad company had acquired as against abutting owners, the right to maintain its road along an avenue in New York city through a subway. In 1892 the legislature passed an act compelling defendant to operate its road upon a steel viaduct elevated above the ground, thus giving the public the use of the whole of the surface of the street, which before was impossible. This improvement was made by the state under the direction of an independent board, which was appointed by the mayor of New York under the authority of this statute. The act further provided that the expense should be borne by the city and this defendant in equal proportions. Plaintiff, the owner of abutting property, sues for damages sustained by reason of the interference with his easements of light, air and access, by the erection of this viaduct upon which defendant's trains are now being run. *Held*, that the railroad company was not liable. *Muhlker* v. *New York & Harlem Railroad Company* (1903), — N. Y. —, 66 N. E. Rep. 558.

The court, admitting the injury to the plaintiff, takes the ground that the defendant is not liable because it had no alternative but to obey the command of the statute and use the viaduct erected by the state. On principle, the doctrine thus laid down would seem to be opposed to that laid down in the recent case of *McKeon* v. *N. Y., N. H. & H. R. Co.*, — Conn. —, 53 Atl. Rep. 656, where the court said that the "liability is not removed because defendant was compelled to make the changes which involved the damage to the plaintiff's property." See I MICHIGAN LAW REVIEW, 524. In the present case a strong dissenting opinion was rendered by Bartlett, J., in which Cullen, J., concurred.

RES JUDICATA—GARNISHMENT IN FOREIGN JURISDICTION AS A DEFENSE.—Defendant operated a line of railway extending through several states and was indebted to plaintiff on contract for services rendered. To an action for the amount, defendant pleaded a judgment against it for the same demand in garnishment proceedings in a foreign jurisdiction. *Held*, that such plea was no defense to the action. *Bailey* v. *Pennsylvania Ry. Co.* (1903), — N. J. Law, —, 54 Atl. Rep. 248.

It is a well settled rule that the pendency of an ordinary suit between the same parties for the same cause of action in a foreign jurisdiction is no bar to a second action. *Stanton* v. *Embry*, 93 U. S. 548; *Hatch* v. *Spofford*, 22 Conn. 497, 58 Am. Dec. 433; *Imlay* v. *Ellepen*, 2 East, 457. But by the weight of authority, there is an exception to the above rule in the case of garnishment proceedings and a plea of prior garnishment in a foreign jurisdiction is a good defense. *Hanna* v. *Embree*, 5 Johns. 101; *Bowne* v. *Joy*, 9 Johns. 220; *Harvey* v. *Gt. No. Ry.*, 50 Minn. 405, 52 N. W. Rep. 905; *Baltimore & Ohio Ry. Co.* v. *May*, 25 Ohio St. 347; *Mattingly* v. *Boyd*, 20 Howard 128; ROOD ON GARNISHMENTS, sec. 201. The principal case seems to have been decided upon the authority of *Kerr* v. *Willetts*, 48 N. J. Law 78, 2 Atl. Rep 782, which did not involve a foreign garnishment, and would, therefore, fall under the general rule.

SALES—AGENCY AND CONDITIONAL SALE DISTINGUISHED. — Appellant wrote to a retailer to whom he had been selling but whose credit had become bad, that he could not sell him goods "outright," but would consign to him furs "which you agree to handle for my account and hold proceeds in trust making settlement within 30, 60, or 90 days—as soon as the money may be collected"—which offer was accepted and the furs shipped. They were later levied upon by the retailer's creditors. In an action on the replevin bond

given by the consignor, *Held*, Magruder, J. dissenting, that the transaction constituted an agency and not a conditional sale, hence the goods were not subject to execution. *Fleet* v. *Hertz* (1903), — Ill. —, 66 N. E. Rep. 858 (reversing 98 Ill. App. 564).

The circumstances of this case bring it very close to the dividing line. The consignee was to remit for goods sold, according to fixed invoice prices, with nothing said as to retail prices, commissions, or return of goods unsold, and was to bear expense of shipping, insurance, etc. No remittances were made except a stranger's note received in an independent transaction, but appellant, knowing consignee's condition and without seizing the remaining goods insisted on a settlement. The parties in their correspondence spoke of the debt and money owing and of the goods "bought." "In construing these anomalous instruments courts look chiefly at the essential nature and preponderating features of the whole instrument and not at the peculiar form of isolated parts of it." MECHEM ON SALES, sec. 46 and cases cited. For a review of the authorities see *Arbuckle* v. *Kirkpatrick*, 98 Tenn. 221, 39 S. W. R. 3, 36 L. R. A. 285; note 22 L. R. A. 850; also the recent case of *Cooper* v. *Bailey*, — Tex. — 73 S. W. R. 724.

SALES—FOR CASH—PAYMENT WITH OLD ACCOUNT.—Plaintiff contracted to sell defendant certain specific property to be paid for on delivery. When the latter had obtained possession of the goods he refused to pay cash but tendered an account due him from plaintiff. In an action of detinue, *Held*, that no title passed and the goods could be recovered. *Drake* v. *Scott* (1903), — Ala. —, 33 So. Rep. 873.

When delivery and payment are expressly or impliedly made concurrent acts the buyer cannot tender in payment an old account or the vendor's matured note. *Wabash Elevator Co.* v. *Bank*, 23 Oh. St. 311; *Wilmarth* v. *Mountford*, 4 Wash. (U. S. C. C.) 79, 30 Fed. Cas. p. 70; *Allen* v. *Hartfield*, 76 Ill. 358; *Barker* v. *Walbridge*, 14 Minn. 469; *Woolsey* v. *Axton*, 192 Pa. St. 526, 43 Atl. R. 1029; *Bush* v. *Bender*, 113 Pa. St. 94, 4 Atl. R. 213. If, however, the seller sues for the price instead of the goods, the buyer may set-off any proper claim. MECHEM ON SALES, sec. 1438, citing *Eland* v. *Karr*, 1 East 375; *Cornforth* v. *Rivett*, 2 M. & Sel. 510; so if the contract when made passes title and delivery is complete (See case and note following:) *Baker* v. *Fisher*, 19 Ont. Rep. 650.

SALES FOR CASH—PASSING OF TITLE—WAIVER OF CONDITION.—Plaintiff sold furniture to R, who agreed to pay cash therefor. It was delivered from time to time during a month and placed on premises leased by R from defendant. Delivery was completed during plaintiff's absence. On his return he demanded payment, receiving part and a promise of the balance at once. Next day R asked for credit and plaintiff took a chattel mortgage on the furniture. In a suit on the mortgage defendant intervened claiming a landlord's lien. *Held*, that title to the goods remained in plaintiff until the mortgage was taken. *Austin* v. *Welch* (1903), — Tex. —, 72 S. W. Rep. 881.

A contract of sale of a specific chattel for cash may mean either of two things: that payment is a condition precedent to the passing of title, or a condition precedent to the right to possession, which right would be divested by delivery, leaving the seller only a personal remedy. Courts have sometimes failed to observe clearly this distinction. Each case depends upon its own particular circumstances. BENJAMIN ON SALES, (7th Am. ed.) note 4, p. 298; MECHEM ON SALES, sec. 541, where authorities are collected. Whether or not there has been a waiver is a question for the jury. MECHEM ON SALES, sec. 549 and cases cited.